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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1956

No. 573

ADELBERT W. LEE, *Petitioner*,

v.

THE AETNA CASUALTY & SURETY COMPANY,
a corporation,
and
THE AUTOMOBILE INSURANCE COMPANY,
a corporation,
and
WOODROW W. MILLER, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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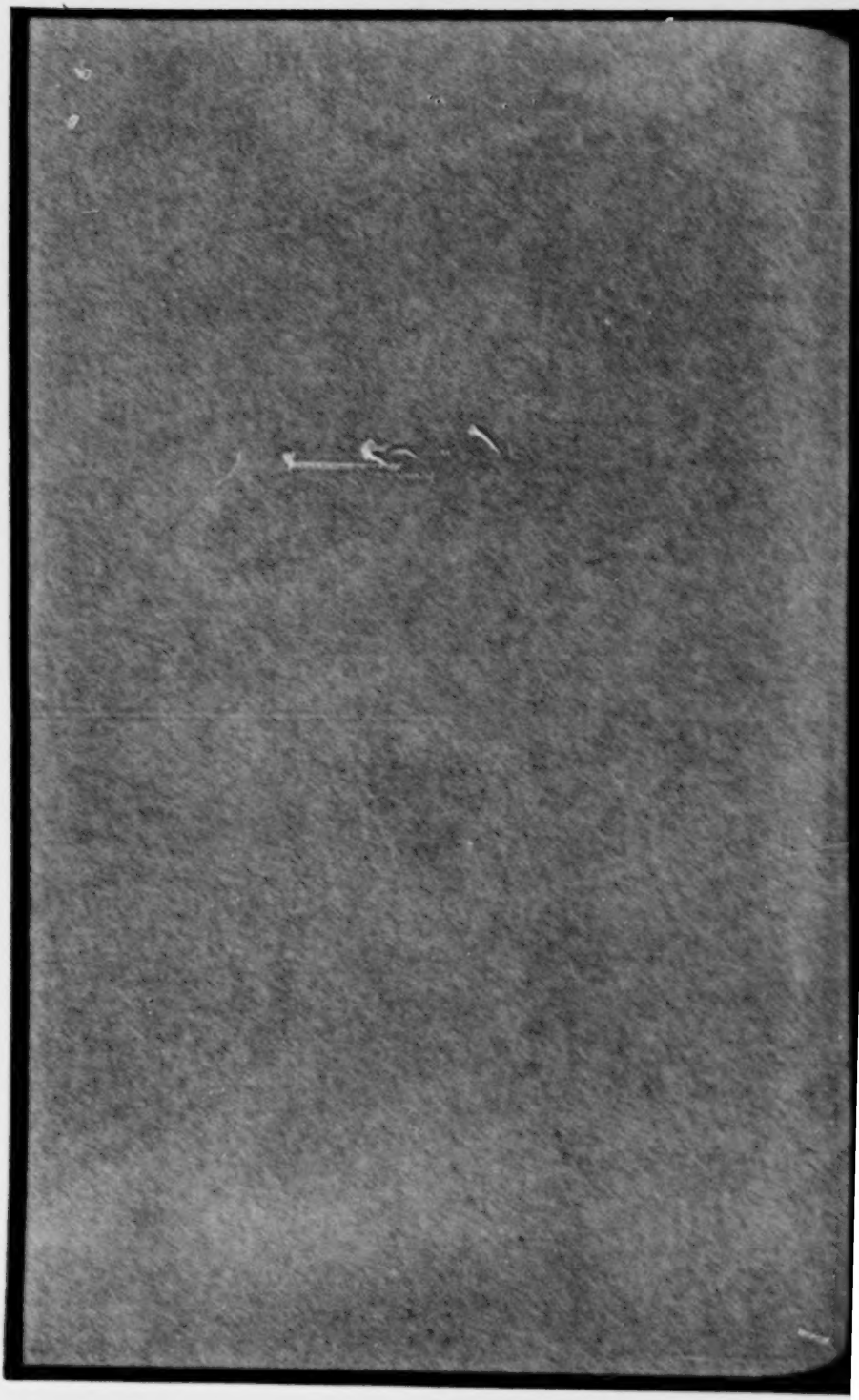

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and
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioner's statement of the case is so brief and incomplete that respondents deem it essential to make a complete counterstatement of the case.

For convenience, petitioner will sometimes be referred to as "plaintiff", and the respondents will sometimes be referred to as "defendants", which was the position of the parties in the District Court.

COUNTERSTATEMENT OF CASE

Plaintiff is a real estate appraiser and broker, professional witness, participant in civic affairs, and insurance agent and broker (J.A. 30, 102, 147). The Aetna Companies have about one hundred and twenty-five or one hundred and thirty agents in the metropolitan area of Washington, D. C., who or which place business with them (J.A. 266), and they also obtain business through independent brokers. For many years plaintiff was an agent of the Aetna Companies (J.A. 30), and was also at the same time agent for a large number of other insurance companies (J.A. 132). Defendant Miller is a young man who had twice entered the employ of plaintiff and had been trained by the Aetna Companies in the insurance business, both prior and subsequent to his service in the Armed Services during World War II, the latter under the GI Training Program (J.A. 110, 215). As he testified at the trial, defendant Miller, in his later employment with plaintiff, was given the title of "Manager" of plaintiff's insurance department, but was required to perform an assortment of odd jobs, including working on files, cutting the grass, taking plaintiff's children to school, and tacking up real estate sale signs (J.A. 213-14). He served as manager of plaintiff's insurance department from 1948 to March 1951 (J.A. 31, 214-15).

Plaintiff acted as agent for the Aetna Companies under a written contract of agency (Exhibit No. 1: J.A. 458-60). The significant provisions of the agency agreement were that such agency should not be to the exclusion of other agents; that upon termination at any time by either party giving notice to the other in writing, there should be no obligation on the part of the companies for the payment of commission upon re-

newals of any business secured during the existence of the agreement, nor for the payment of any further remuneration for the business of the agency existing at the time of such termination; and that, if the agent is not financially indebted to the companies, the agent's record of policyholders and expiration dates of policies shall remain in his exclusive possession, and the companies' record or knowledge thereof shall not be referred or communicated by the companies to any other agent nor used by said companies for purposes of solicitation.

The defendant Aetna Companies knew that defendant Miller was working with plaintiff as manager of plaintiff's insurance agency from some time in 1948 (J.A. 214), but they had no knowledge of the nature, terms or conditions of the employment. They assumed that the relationship was entirely satisfactory to both parties until sometime around the middle of March 1951, when defendant Miller advised the Superintendent of Agents for the defendant Aetna Companies of his intention to leave the plaintiff and go in business for himself (J.A. 220). The Superintendent of Agents and the Branch Manager of these Aetna Companies attempted to dissuade defendant Miller from leaving plaintiff (J.A. 220-24, 269, 291); but shortly thereafter defendant Miller advised the said Superintendent of Agents that he had decided to leave plaintiff (J.A. 218, 249) and had notified plaintiff of his decision (J.A. 221, 224), and that he wanted to know if the Aetna Companies would appoint him as an agent. At the trial, Defendant Miller testified that he determined that he wanted to leave the plaintiff's employ and go in business for himself, and that he had a conference with his attorney on Friday, March 16, 1951, in which his

decision was definitely made (J.A. 216-17). He notified plaintiff of his intention to leave on March 19, 1951 (J.A. 33, 218), but at that time did not have any intention of leaving immediately. However, on March 20, 1951 (J.A. 222), in conversations among the plaintiff, defendant Miller and representatives of the Glens Falls Insurance Company, plaintiff impugned defendant Miller's integrity, and defendant Miller advised plaintiff he was leaving then and there (J.A. 224, 259).

On March 21, 1951, with notice that defendant Miller had severed his connection with plaintiff, the Superintendent of Agents for the Aetna Companies agreed to appoint defendant Miller as an agent for these companies (J.A. 228, 287). The evidence disclosed that at and around this same time defendant Miller sought and obtained an appointment as agent for other insurance companies not connected with the Aetna Companies (J.A. 133, 222-25). The Superintendent of Agents for the Aetna Companies promptly called plaintiff and made a date to meet with him at luncheon a day or two thereafter (J.A. 271, 287), at which time he notified plaintiff of the decision of the Aetna Companies to appoint defendant Miller as their agent (J.A. 271). There is a dispute as to whether plaintiff voiced any objection or not. Plaintiff says he did (J.A. 35). Mr. Rhine, who was at that time Superintendent of Agents for the Aetna Companies, testified that plaintiff made no objection (J.A. 272, 286), and, in fact, that if plaintiff had objected he probably would not have gone through with the appointment of defendant Miller as an agent (J.A. 287). In that conference with plaintiff, Mr. Rhine, anticipating the likelihood of requests for transfer of business produced by defendant Miller, reminded plain-

tiff of the custom and practice of the Aetna Companies in handling requests of one agent to transfer accounts or business produced or placed with them by another agent at some previous time (J.A. 272).

This practice was and is that when an agent tenders an order for placing by or through him of insurance previously placed with the companies by another agent, the company requires such prospective new agent to obtain and submit a letter of authorization from the policyholder, requesting the companies to recognize such prospective new agent as his agent for handling the business; that the company then notifies the existing or prior agent of such request of the policyholder, and gives him five days in which to obtain a countermanding order from the policyholder; and that then, after the expiration of the five-day period, the company will honor the instructions of the policyholder and recognize the new agent as the agent on the business, if the old agent has failed to submit a countermanding order (J.A. 35, 36, 255, 272, 309, 344). This practice of the Aetna Companies is in full accord with the general custom and practice in the insurance business, in the District of Columbia area as well as elsewhere (J.A. 192, 309, 344, 411-13, 414-15). All companies follow the practice of honoring the instructions of the policyholder in the designation of his agent, and the Aetna Companies and some other companies go further and give the old agent notice and opportunity to obtain a countermanding order (J.A. 192).

The Aetna Companies, like other companies operating branch offices in the territory where policies are written for agents upon order, follow the practice of writing up a prospective renewal policy a month or

two before the expiration of existing coverage, and of sending that prospective renewal policy to the existing agent, so that he may contact the policyholder and tender the renewal, thereby facilitating the maintenance of his advantage over other agents in obtaining renewal coverages (J.A. 136-37).

The defendant Miller had previously been appointed and was a policy writing agent for the Aetna Companies in Maryland (J.A. 197, 226, 290). He was licensed as a policy writing agent and as a broker in the District of Columbia on March 27, 1951 (J.A. 44, 186, 197). Defendant Miller was allotted desk space in a separate office area maintained by the Aetna Companies for its "office agents," adjacent to but physically separated from its branch office in the Investment Building (J.A. 228, 267, 313).

Like other insurance companies similarly engaged, the Aetna Companies have agents who own and maintain their own separate offices and agents who prefer to utilize space provided by the companies in an agency office (J.A. 228-29, 253). The latter are sometimes called "office agents," but are in fact no less independent in the pursuit of their own individual businesses (J.A. 253, 266, 313). The Aetna Companies have four different scales of commissions, known as the producer's schedule, the regional agent's schedule, the district agent's schedule, and the general agent's schedule, respectively (J.A. 316). The appropriate schedule is based upon a number of factors, including the separate facilities maintained by the agent and the volume of business produced (J.A. 315). Plaintiff had just previously been granted the regional agent's schedule of commissions (J.A. 32, 315-16), which, on an average spread of types of coverages, would aver-

age about 2% more commission than the basic producer's schedule (J.A. 318). Defendant Miller was given the producer's schedule of commissions (J.A. 252-53). The cost of the office space and local telephone service provided for all "office agents" averaged about 2% of their premium production, so that the net cost of procurement for the Aetna Companies on business produced by an office agent at the producer's schedule of commissions was substantially the same as that of an agent maintaining his own office on a regional agent's schedule of commissions. TheAetna Companies pay even higher rates of commission to to district agents and general agents than was payable to plaintiff, and about 50% of their local production is from agents receiving such higher rates of commission (J.A. 335). The basic producer rate of commission is payable on only about 25% of the local production of the Aetna Companies (J.A. 335).

In due course during the months following his appointment as agent, the defendant Miller tendered from time to time orders for the placement of policies for policy holders who had previously been insured by the Aetna Companies for the same coverage through plaintiff's agency (J.A. 250-51). These companies followed their usual practice of requiring the defendant Miller to obtain from the policyholder, in each and every instance, a letter requesting or directing the particular Aetna Company to recognize and deal with the defendant Miller as agent for such policyholder, and then of giving plaintiff notice (J.A. 99), of the receipt of such letter from the policyholder and of his having five days in which to obtain a countermanding order if he desired or was able to do so (J.A. 35-6, 250-51, 255, 272, 274-284, 309, 344).

When and as plaintiff received such notices from time to time, he naturally complained of losing the business to defendant Miller, but did not complain of the method of handling the matter by the Aetna Companies (J.A. 35, 294, 311). In a great many instances he recognized that the policyholder was a relative or close friend of defendant Miller, and in a great many other instances he indicated that it was "OK" (J.A. 274-84). In no case did plaintiff obtain and tender a countermanding order. These Aetna Companies thereupon recognized defendant Miller as the agent on the business of the particular policyholder after the expiration of the five-day period allowed plaintiff for obtaining a countermanding order and in the absence of such countermanding order. Over the period of more than a year, there were about sixty such accounts transferred from the plaintiff's account as agent to the account of defendant Miller as agent.

Many of the letters of authorization were in the handwriting of the policyholder (J.A. 236-37). A large number of them were typed, and in somewhat substantially the same form (J.A. 198-205). In the trial, defendant Miller freely stated that he prepared some of the letters for the policyholders at their request after being requested by the policyholder to write the business, and in still others he advised them what to say in the letter to the company (J.A. 198-204, 230, 238).

The defendants were prepared to prove that each and every one of the policyholders in question had *not* been solicited by the defendant Miller (J.A. 203), but that, to the contrary, each and every one of them had contacted defendant Miller and requested him to write the insurance. Fourteen of these policyholders actually took the stand and testified (J.A. 376). At the

urging of the trial judge, counsel stipulated the testimony of thirty-three others as being substantially the same as nine of those who had testified (J.A. 377). Plaintiff withdrew fourteen of the accounts from consideration in the case, and three others were stipulated to be out of the city and not insured through defendant Miller (J.A. 378).

Most of the policyholders in question were friends, fellow church members, or friends of friends of the defendant Miller or his wife (J.A. 216, 231, 235, 260, 319-20, 322, 331, 347, 350, 361, 364, 366, 373, 379). On each occasion the defendant Miller informed the policyholder that the insurance companies required a letter of authority before they would recognize him as agent (J.A. 234, 331, 332, 350, 373, 382). The policyholders thereupon asked defendant Miller to prepare the required letter or to advise them what was required to be said therein (J.A. 353, 363, 375, 382). Defendant Miller had actually procured the original insurance coverages for these friends, fellow church members and friends of friends, while he was employed in plaintiff's insurance agency (J.A. 216, 232, 236, 260, 320, 322, 331, 348, 361, 364-65, 373, 379). Plaintiff had broadcast the fact that defendant Miller had left his agency (J.A. 110-11, 370, 374, 546, 547), and that he had appointed someone else to operate his insurance department (J.A. 111, 545, 546, 547), and the news that defendant Miller had gone in business for himself naturally became a matter of common knowledge among friends and acquaintances in church and social circles and among friends of such friends (J.A. 234-36, 260, 331, 350, 362, 364, 374). These policyholders very naturally and understandably stated that they wanted defendant Miller to continue handling their in-

surance business (J.A. 234, 236, 260, 331, 347, 350, 352, 362, 364, 375).

The Altmann, Washington-Marlboro and Annapolis Bus Line and Chesapeake Broadcasting Company accounts were changed by direction of Mr. L. L. Altmann, as the result of Mr. Altmann becoming displeased over the plaintiff's handling of return premiums due the bus line upon audit of the prior year's policies (J.A. 52, 123, 160, 372, 402). In April, 1951, the Aetna Companies established that the bus line was entitled to return premiums aggregating $5,916.54 (J.A. 307, 368). While the money was due to the policyholder, the usual custom, or method of handling, was to allow such return premium credits on the account current of the producing agent. Accordingly, the Aetna Companies notified plaintiff and gave him credit on his account current with them for the said return premium (J.A. 159, 307). Certain of the current bus line premiums were paid on a monthly payment plan; and plaintiff merely sent a credit memorandum to the bus line showing that he held the return premiums as credits against monthly payments due or to become due on the current year's policies (J.A. 123, 160, 368). This displeased Mr. Altmann, who felt that the return premiums were due and payable in cash (J.A. 52, 123, 160, 372, 402), and that there was no excuse for plaintiff to withhold or retain the money and merely apply the same as credits on premium obligations which he considered were not yet payable.

Mr. Altmann wrote a letter on May 9, 1951, to the Aetna Companies directing that they recognize the defendant Miller as his agent effective as of April 30, 1951, and sent a copy thereof to plaintiff (J.A. 304, 369, 390, 467). Plaintiff objected to the retroactive effective date, and so advised the Aetna Companies

(J.A. 304, 465, 466). Mr. Boone, Branch Manager for the Aetna Companies, agreed with the plaintiff that a change of agent could not be made retroactively, and he went to see Mr. Altmann and so advised him (J.A. 305, 371, 386-87, 397, 401). Whereupon, Mr. Altmann wrote a superseding letter, on May 21, 1951 (J.A. 371, 402, 465), to the Aetna Companies directing that they recognize the defendant Miller as his company's agent on its business, but this time made the change effective as of May 31, 1951 (J.A. 386-87, 401).

Under the change procured for plaintiff by Mr. Boone, Mr. Altmann's company paid the plaintiff two more monthly payments on the current policies, being the April and May installments, and thereby gave plaintiff offsetting credits of $5,277.20 against the said return premiums due the bus line (J.A. 470-472). In response to an inquiry by Mr. Altmann, Mr. Boone advised him that the balance of $639.34 was the obligation of the Aetna Companies and would be paid by them if not paid by plaintiff (J.A. 308-9, 470-71). The entire transaction was covered by letters addressed to the respective parties, with a copy of the letter to Mr. Altmann being sent to plaintiff (J.A. 308-9, 465-72). At the time plaintiff acquiesced in and accepted this solution of the matter, without any objection or protest (J.A. 163, 335), and accepted the premium payments subsequently made pursuant thereto by the bus line (J.A. 164). However, at the trial, plaintiff contended that the change of agents in mid-term should have been required to be on a short rate cancellation basis, the effect of which would have been to deter Mr. Altmann from changing agent, and that he acquiesced in the solution worked out by Mr. Boone because he could not risk disruption of his agency at that time (J.A.

52-3, 74). It was demonstrated that by reason of certain premiums having been paid in advance, plaintiff had received more commission than under a short rate cancellation (J.A. 409-10).

Plaintiff also complained about alleged disclosure of audit premium information to defendant Miller on business of his policyholders, which, at trial was stated to refer to the Henderson and Leonard accounts (J.A. 46, 48, 263). The testimony disclosed that each of these policyholders were proprietors of gasoline filling stations; that in the Henderson case (J.A. 46, 230), and possibly also the Leonard case (J.A. 46-49, 239, 293), defendant Miller happened to drive into the filling station to buy gasoline, and while he was there the policyholder asked him about an additional premium statement received from the company as the result of a payroll audit, and requested defendant Miller to check and see if it was correct. Defendant Miller had written the business in the first instance, while with plaintiff (J.A. 230). *The policyholder gave defendant Miller the payroll audit statement* (J.A. 47-48, 230, 239). Defendant Miller brought the same into the office of the payroll audit department of the Aetna Companies, and made inquiries about the correctness of the payroll figures and the computation of the premiums due (J.A. 230, 293). The company's employee in the auditing department discussed the audit and premium with defendant Miller, who being thereupon satisfied that it was correct, returned the statement to the policyholder with the comment that it appeared to be correct and payable (J.A. 48, 230, 293). Payroll audit records are entirely separate and distinct from underwriting "expiration" records (J.A. 293, 313), and in fact no records of the Aetna Companies on the business were disclosed to defendant Miller (J.A. 231).

Moreover, defendant Miller never solicited either the Henderson (J.A. 230) or the Leonard accounts (J.A. 239) and never obtained any business from either of them after leaving plaintiff and going in business for himself (J.A. 264). Plaintiff retained the business of both of these policyholders for a period of time, and then lost the Henderson account, Leonard having gone out of business in the meantime (J.A. 51, 132-33).

Plaintiff continued his agency for the Aetna Companies after defendant Miller left him. He employed one William F. Devine to handle his insurance business (J.A. 45, 284, 545, 546). Mr. Devine was not experienced in the insurance business (J.A. 45, 147), and the defendant Aetna Companies, in line with their usual practice of rendering underwriting, engineering and claims services to their agents generally (J.A. 311, 333), extended considerable assistance to Mr. Devine and plaintiff's agency in guiding and assisting Mr. Devine, in servicing the business of the agency, and in developing new business through the agency's contacts (J.A. 149, 267-68, 285, 295-301, 311). In fact, both plaintiff and Mr. Devine wrote letters of appreciation in the Fall of 1951 for the assistance and service given them by employees of the Aetna Companies (J.A. 311, 538, 539, 540). Through all of this time, the Aetna Companies assumed and understood that their relationship with Mr. Lee as their agent was both cordial and mutually satisfactory (J.A. 285-86, 312, 334, 554). The agency relationship was continued until plaintiff filed the action in question and made charges of breach of contract and of bad faith, which the Aetna Companies considered to be repugnant to the continuance of the agency, and they thereby terminated the same effective on May 5, 1952 (J.A. 529).

ARGUMENT

I. MILLER HAD A LEGAL RIGHT TO SOLICIT LEE'S FORMER CUSTOMERS AND COULD NOT CONSPIRE TO DO WHAT HE HAD A LAWFUL RIGHT TO DO

At the outset, it is important to establish the right of defendant Miller with reference to solicitation of plaintiff Lee's former customers notwithstanding respondents will demonstrate that Lee offered no evidence whatsoever to show solicitation, and, in fact, Miller did not solicit. It was conceded at the trial that Miller had a right to not only solicit customers whom he had taken to Lee but other customers as well and that he could put those customers in any insurance company, including the defendant Aetna companies; that he had a right to establish an office any where he chose, even next door to Lee, representing defendant Aetna and could solicit in any sort of fashion, whether by word of mouth, advertising, or otherwise (J.A. 429, 437, 453).

There was no agreement between Lee and Miller that the latter would not solicit. Accordingly, under the majority and better-reasoned rule, Miller could not be liable to Lee for solicitation. *Fulton-Grand Laundry Co.* v. *Johnson*, 140 Md. 359, 117 Atl. 753, 23 A.L.R. 420 and *Wooley's Laundry, Inc.* v. *Silva*, 304 Mass. 383, 23 N. E. (2nd) 899, 126 A.L.R. 752. Ann. 23 A.L.R. 423 and 126 A.L.R 758; Restatement, Agency, Sec. 393, Comment, e; ibid. Sec. 396.

We are not concerned here with what rule may obtain when the employee takes with him records of customers, for there was no testimony that Miller took any records with him. Lee conceded that the only information Miller took when he left his employ was the "information in his head" (J.A. 121). Miller testi-

fied he did not take any records of any kind and while in Lee's office did not make any memorandum of expirations or policyholders for his own purposes. (J.A. 248).

Miller contended that there was no case against him because he had a legal right to do the soliciting which he was alleged to have done. This contention was rejected by the District Court, and the theory of his liability was, in essence, that Miller had conspired with defendant Aetna companies with intent to deprive Lee of his property rights (J.A. 434). However, there was no suggestion that the alleged solicitation was done in an unlawful manner.

"The essence of conspiracy is an agreement—together with an act—to do an unlawful act, or a lawful act in an unlawful manner." *Cooper* v. *O'Connor,* 69 App. D.C. 100, 107, 99 F. 2d 135, 142; 118 A.L.R. 1440, 1449, certiorari denied 305 U.S. 643, 59 S. Ct. 146, 83 L. Ed. 436. Also to the same effect see *Edwards* v. *James Stewart & Co.,* 82 U.S. App. D.C. 123; 160 F. 2d 935.

There must be an overt act which causes damage—*Nalle* v. *Oyster,* 230 U.S. 165, 57 L. Ed. 1439, 1446—and the overt act must be actionable. *Nalle* v. *Oyster, supra.*

In the instant case, just as in *Nalle,* the overt act, namely, Miller's alleged solicitation of Lee's customers, was a perfectly proper act for Miller and, being not actionable, could not form the basis of a conspiracy. The overt act itself was not unlawful nor was the manner of doing it.

The alleged conspiracy itself did not create any wrong. Only the wrongful acts done by a defendant

to the injury of a plaintiff create the cause of action. *DeBobula* v. *Goss*, 90 U.S. App. D.C. 28, 29, 193 F. 2d 35, 36. *Ewald* v. *Lane*, 70 App. D.C. 89, 90, 104 F. 2d 222, 223.

See also *Clein* v. *City of Atlanta*, 139 S.E. 46, 164 Ga. 529, 53 A.L.R. 933, 938, *Werth* v. *Fire Companies' Adjustment Bureau*, 171 S.E. 255, 259, 160 Va. 845, cert. den. 54 S. Ct. 74, 290 U.S. 659, 78 L. Ed. 570, *West Virginia etc. Co.* v. *Standard Oil Co.*, 50 W. Va. 611, 40 S.E. 591, 594, 56 L.R.A. 804, 88 Am. St. Rep. 895.

As a matter of fact, Lee failed to establish any prearrangement, combination, or collusion between Miller and Aetna companies and therefore failed to establish even a conspiracy. *Hollinberger* v. *Stewart*, 41 App. D.C. 197, 199.

II. LIABILITY OF THE INSURANCE COMPANIES CAN BE FOUNDED ONLY UPON MISUSE OF THE AGENT'S "EXPIRATIONS" RECORDS

As the result of voluntary agreements between insurance companies and insurance agents, operating under what is known as the "American Agency System," the records of insurance placed by an agent with an insurance company, containing name and address of policyholder, amount and type of coverage, description of property or other thing insured, amount of premium, and expiration date, which are generally referred to as "expirations", become and are the property of the agent, upon termination of the agency agreement, if the agent has paid his accounts and is not in arrears with the company. *Phillips* v. *Penna. Threshermen etc. Co.* (CCA-4), 199 F. (2d) 244; *Kerr & Elliott* v. *Green Mountain Mut. F. Ins. Co.*,

111 Vt. 502, 18 A. (2d) 164; *Northwest Underwriters* v. *Hamilton*, (CCA-8), 151 F. (2d) 389; *Beidler & Bookmyer, Inc.* v. *Universal Ins. Co.* (CCA-2), (First Case) 134 F. 2d 288; (Second Case) 140 F. (2d) 390; *Woodruff* v. *Auto Owners Ins. Co.*, 300 Mich. 54 1 N.W. (2d) 450; *Annotation*, 124 ALR 1355. In *Northwest Underwriters* v. *Hamilton, supra*, the court held that a covenant of non-interference should be implied during the continuance of the agreement, in recognition of the rights existing upon termination thereof.

The provision of the agent's agreement for non-liability of the company for commissions on renewals makes it plain that the agent's right of recovery is dependent solely upon proof of soliciation by and with the use of the "expirations" records, either directly by the company or by another agent to whom the company has wrongfully communicated the records. *Phillips* v. *Penna. Threshermen etc. Co., supra; Northwest Underwriters* v. *Hamilton, supra.*

Petitioner cites the *Phillips* case, but does not make clear that the company in that case had admittedly made use of the "expirations" records, through former sub-agents of plaintiffs who had become direct agents of defendant, and defended the action upon the major premise that the "expirations" belonged to the sub-agents and thereby they were entitled to use them.

Petitioner also cites the *Phillips* case in an effort to distinguish "expirations" from "expirations records". But the Court in that case defined "expirations" in such manner as to leave no doubt that when the Court used the term "expirations" it was talking

about expiration records. In that case, the Court said (p. 246) that:

> "'Expirations' in the insurance field has a definite and well recognized meaning; it embodies the records of an insurance agency by which the agent has available a copy of the policy issued to the insured or records containing the date of the insurance policy, the name of the insured, the date of its expiration, the amount of insurance, premiums, property covered and terms of insurance. This information enables the agent to contact the insured before the existing contract expires and arms him with the information essential to secure another policy and to present to the insured a solution for his insurance requirements. It has been determined that this information is of vital assistance to the agency in carrying on the insurance business and it has become in the insurance field, recognized as a valuable asset in the nature of good will."

There is no conflict of authority among the Circuit Courts of Appeals, as all decisions hold "expirations" to be the *records* of pertinent facts on insurance written. See: *Heyl* v. *Emery & Kaufman, Limited,* (CCA-5), 204 F. (2d) 137; *Northwest Underwriters* v. *Hamilton, supra.*

Nor does any conflict exist between *Phillips* and the decision below by the Court of Appeals which correctly stated that *Phillips* "specifically conditioned its result on unauthorized use of plaintiff's expiration records". This is what the Court said in *Phillips* (p. 249):

> "We are not holding that the defendant is liable for employing the former agents selected by plaintiffs. If those agents *had not made use of the expirations* on policies written before the termination of the Contract, no actionable wrong would

> have been committed by defendant; but neither the defendant nor the re-appointed agent nor a new agent had any right to use the expirations awarded to plaintiffs in their Contract with defendant." (Emphasis supplied)

While the plaintiff in the *Phillips* case was an exclusive agent, petitioner's contract as agent for the Aetna companies was "not to the exclusion of other agents" in the same territory. Competition among agents for business is customary and was plainly contemplated here. The Aetna companies had no liability to Lee for having appointed Miller as an agent.

It is fundamental that the insured or policyholder can purchase insurance through any agent he may choose; and the insurance company is under no obligation to protect the existing or prior agent against the insured's choice of another agent through whom to place the insurance. *Northwest Underwriters* v. *Hamilton, supra; Beidler & Bookmyer* v. *Universal Ins. Co., supra; Clinchy* v. *Grandview Dairy,* 283 N.Y. 39, 27 N.E. (2d) 425; *Degnan* v. *General Accident F & L Assur. Corp.,* 161 App. Div. 439, 146 N.Y.S. 360, aff. 221 N.Y. 484, 116 N.E. 346; *Erlin* v. *National Union F. Ins. Co.,* 217 Cal. 374, 18 P. (2d) 660. Upon receiving notice of the insured's selection of a new agent, the insurance company is entirely free to deal with such new agent. *Northwest Underwriters* v. *Hamilton, supra.* If the existing agent can not control the rewriting of the insurance, he loses nothing because the insurance company writes policies through another agent. *Northwest Underwriters* v. *Hamilton, supra.*

III. THERE WAS NO EVIDENCE OF SOLICITATION, USE OF PETITIONER'S "EXPIRATIONS" RECORDS, MALICIOUS INTERFERENCE WITH PETITIONER'S BUSINESS, OR CONSPIRACY BY RESPONDENTS FOR ANY SUCH ACTION.

Petitioner's (plaintiff's) claim was that the respondents (defendants) conspired to deprive him of his insurance business, and interfered with the same by solicitation and use of his "expirations" records, directly or indirectly, in violation of his contract with the Aetna Companies. Plaintiff had the burden of proving those allegations, but he failed to do so. There is not even a scintilla of evidence of solicitation by defendants, or any of them, or of any use of plaintiff's "expirations" records. There is here no elimination of plaintiff as agent and taking over his sales organization as was done in *Phillips* v. *Penna. Threshermen, etc. Co., supra.* There is here no evidence whatsoever of any interference by the defendant insurance companies with the plaintiff's free and full opportunity of obtaining renewals or of keeping his business.

On the contrary, the uncontradicted testimony was and is that, in each and every case, the insured notified the defendant Aetna Companies of his or her or its decision to place the insurance through the defendant Miller, as the producing agent, and that the defendant Aetna Companies fully complied with their usual and established custom and practice of notifying plaintiff of the receipt of such instructions from the insureds, and of giving him five days in which to obtain a countermanding order in each case, if he could. Thereafter, in the absence of any countermanding order, defendant Aetna Companies recognized defendant Miller as the producing agent, and accepted and placed the insurance through him. Such action of the defendant Aetna Companies was in full accord with established

custom and usage in the insurance business. By taking such action in such manner, the defendant Aetna Companies incurred no liability to the plaintiff. *Northwest Underwriters* v. *Hamilton, supra; Beidler & Bookmyer* v. *Universal Insurance Co., supra; Phillips* v. *Penna. Threshermen, etc. Co., supra.*

Plaintiff had the burden of establishing the basic and essential facts by competent and substantial evidence. "Substantial evidence" was very cogently defined by this Court in the case of *National Labor Relations Board* v. *Columbian Enameling and Stamping Co., Inc.*, 306 U.S. 292, 59 S. Ct. 501, 83 L. ed. 660, as follows:

> "* * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' Consolidated Edison Co., 305 U.S. 197, 83 L. ed. 126, 59 S. Ct. 206, supra, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn from it is one of fact for the jury. See Balto. and Ohio R.R. Co. v. Grover, 266 U.S. 521, 524, 69 L. ed. 419, 422, 45 S. Ct. 169; Gunning v. Cooley, 281 U.S. 90, 94, 74 L. ed. 720, 724, 50 S. Ct. 231; Appalachian Elec. Power Co. v. National Labor Relations Board, supra, ((CCA-4) 93 F. (2d) 989)."

With slight variations in grammar, the Court of Appeals has defined "substantial evidence" to mean the same thing. *Balto. and Ohio R.R. Co.* v. *Postum*, 85 U.S. App. D.C. 207, 177 F. (2d) 53; *Minnesota Mining and Mfg. Co.* v. *Coe*, 73 App. D.C. 146, 118 F. (2d) 593; *National Labor Relations Board* v. *Ar-*

cade-Sunshine Co., Inc., 73 App. D.C. 128, 118 F. (2d) 49.

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a preemptory instruction to the jury." *Canning* v. *Cooley*, 231 U.S. 90, 74 L. ed. 720, 50 S. Ct. 231. "By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." *Brady* v. *Southern R. Co.*, 320 U.S. 476, 88 L. ed. 239, 64 S. Ct. 232.

Plaintiff adduced no competent evidence of the alleged conspiracy, adduced no competent evidence of solicitation by the defendant Miller, and certainly adduced no evidence of any solicitation by the defendant Miller with the use of plaintiff's "expirations" records, divulged or made available to him by defendant Aetna Companies, in violation of their contract with plaintiff, and further did not adduce any evidence that the loss of business complained of proximately resulted from any such alleged solicitation by and with the aid of such "expirations" records. Plaintiff sought to infer the basic and essential facts upon which liability could be founded in law. To do so requires the drawing of inference upon inference. That is, the *fact* of solicitation must be inferred; then the *fact* of solicitation with the use of plaintiff's "expirations" records must be inferred from the inference of solicitation; and then the alleged resulting loss of business must be inferred from such solicitation with such records. Moreover, the alleged conspiracy must be inferred from the inference sought to be drawn from the circumstances.

It is fundamental that an inference can not be drawn upon an inference. *United States* v. *Ross*, 92 U.S. 281, 23 L. ed. 707; *The National Union* v. *Bennett*, 20 App. D.C. 327, 333; *Davis* v. *United States*, 18 App. D.C. 468; *Superior Industrial Gas Corp.* v. *National Cylinder Gas Co.* 64 NYS (2d) 244, aff. 272 App. Div. 836; *Gadsden General Hospital* v. *Bishop*, 209 Ala. 275, 96 So. 148; 20 Am Jur-Evidence, Section 164; *Annotations*, 93 ALR 162.

The inference of solicitation may not be drawn because the policyholders, in each and every case, testified that they were not solicited by defendant Miller, and this testimony by disinterested witnesses is uncontradicted and unimpeached. If the inference of solicitations may not be drawn, then nothing else remains.

An essential element or basic fact in a case may not be inferred from a failure of proof of the fact by the party having the burden of proof. *Galloway* v. *United States*, 319 U.S. 372, 87 L. ed. 1458, 63 S. Ct. 1077. Disbelief of opposing testimony does not supply a want of proof by the party having the burden of proof, nor does the possibility that the jury might disbelieve opposing testimony make a case for submission to the jury where there is a failure of proof by the party having the burden of proof. *Moore* v. *Chesapeake and Ohio R.R. Co.*, 340 U.S. 573, 95 L. ed. 547, 71 S. Ct. 428.

Petitioner makes some incomplete statements as to certain of the evidence, in an effort to show that there were issues of fact for decision by the jury. But upon complete examination of the testimony it is quite evident that no substantial evidence on any material fact

was presented so as to make any genuine issue of fact for jury decision.

On pages 4 and 5, petitioner attempts to develop some issue as to whether the Aetna officials tried to dissuade Miller from leaving him. Actually, Aetna had no duty to dissuade Miller from leaving. The complaint alleges "that on or about March 31, 1951, said defendant Miller, severed his connection with plaintiff and immediately thereafter went to work for said defendant insurance companies" (J.A. 3). Throughout the trial plaintiff conceded that Miller had a right to leave his employ, and there was no issue presented as to the Aetna companies procuring or influencing Miller to leave Lee's employ. At the trial, plaintiff did detail conversations with Aetna officials, in which he said he was informed first that Aetna was not going to appoint Miller as an agent and then later learned that Aetna had appointed him; but there was always some question in plaintiff's testimony as to the timetable of events, for he admitted that he was informed by Aetna officials that Miller was being appointed an office agent "perhaps around the 20th, maybe the 21st." (J.A. 35). The timetable of the events in respect of Miller leaving Lee and being appointed an agent for Aetna are fully set forth in the counterstatement of the case herein and will not be repeated.

Petitioner says that Aetna officials gave him very little assistance after Miller left, citing J.A. 45-6. This testimony of plaintiff plainly related to two cases in which Mr. Betts, Aetna's employee, declined to assist plaintiff because Miller was already working on those cases, and that Betts would not intervene if one agent was already handling the account. Mr. Betts was employed by Aetna in 1951 as field repre-

sentative, assisting agents, of whom he had over fifty to serve (J.A. 296). He was interrogated as to his schedule and the extent of service rendered plaintiff's agency; and he testified that he was set up over a two or three month period to work every Thursday afternoon with Mr. Devine, Miller's successor with plaintiff, because Mr. Devine was new in the business and required more assistance (J.A. 296-7), and that he never cancelled an appointment but that plaintiff's agency did cancel appointments with him and at those times he worked with other agents, including Miller on one occasion (J.A. 299-301). Betts testified that he would have refused to work with Miller on any account that was then written by plaintiff's agency (J.A. 301-2). Any doubt that might exist was set at rest by letters written by plaintiff Lee and Mr. Devine to Aetna, thanking them for the assistance given plaintiff's agency on various accounts (J.A. 538-40). Plaintiff's letter expressly acknowledged assistance by three Aetna employees, and, plaintiff admitted on cross-examination that assistance was given his office (J.A. 149-50). Aetna was not under any legal obligation to render assistance to Lee's agency; and the evidence that such assistance was freely given plaintiff merely tended to disprove the alleged conspiracy.

Petitioner refers to the testimony of Mr. Hummer, treasurer of Epworth Methodist Church. In this case the existing policy expired October 18, 1951. The proposed renewal was written up on August 6, 1951. On August 15, 1951 the insured addressed a letter (on church stationery) to Aetna, directing recognition of Miller as agent; and on August 17, Aetna wrote Lee advising him of the receipt of the instructions from the insured and of the fact that no action would be taken to

transfer the business of record until August 31st (J.A. 489-90).

The witness identified his signature on the letter to Aetna and stated that "Mr. Miller had this written when he changed his connections from Mr. Lee" (J.A. 237). The witness had just been testifying to the placing of the original policy with Miller while Miller was with Lee, and also to the placing of the renewal with Miller after he had gone in business for himself. In this context, it is a most far-fetched, strained and unrealistic interpretation to say that the witness was testifying that the letter was written when Miller left Lee in March rather than when the renewal came up for consideration in August.

Petitioner quotes from the testimony of Mr. Bodmer, who testified that he had known Miller about fifteen years, and belonged to the same church as did Miller; that he desired to get insurance and contacted Miller, not knowing who he was with, but later learned that Miller was with Lee; that he later learned at church that Miller had left Lee; that when he got the policy, Lee's return address was on the envelope; that his insurance was expiring, so he called "Woody" (Miller) up on Saturday night and told him what he wanted, that Miller never asked him to take the insurance with Miller; that he identified the letter he signed (Plaintiff's Exhibit No. 4E), but did not know who prepared it; and that the circumstance as to why the letter was prepared was "because Woody told me he was getting this agency and he wanted verification of customers" (J.A. 350-1). The testimony as to why the letter was obtained may be poorly stated, but certainly reflects no more than a lack of knowledge of the intricacies of the insurance agency business, and is cer-

tainly no contradiction of the witness' testimony, and no indication of any solicitation by Miller.

Petitioner refers to the testimony of Mr. Bonbrest under an introductory statement giving the impression that he was one of the nine policyholders whose testimony was used, by stipulation, as being substantially the same as 33 other policyholders would have testified if called. This is incorrect, as Mr. Bonbrest was not one of the nine (J.A. 376). However, respondents are delighted to answer the assertions upon Mr. Bonbrest's testimony.

Petitioner says that the evidence respecting the Bonbrest account warranted the jury in finding that Miller was making a study of Bonbrest's insurance prior to the time Bonbrest wrote the letter to Aetna authorizing the account to be changed over to Miller as agent, and that the making of an insurance study and recommendations is an insurance agent's strongest form of solicitation. Here again we have a classical illustration of the unfounded, unreasonable and unwarranted charges, conclusions and innuendoes that have characterized this case from the outset. Mr. Bonbrest testified that he was recommended to Miller, and placed some insurance with him while Miller was with Lee, whom he did not know (J.A. 379), that he received a letter dated April 19, 1951 from Lee (J.A. 550), following a telephone call to Lee's office, in which letter Lee proceeded to confess neglect on the part of Miller in handling Mr. Bonbrest's business; that he replied to Lee's letter on April 21st (J.A. 551), advising that his telephone inquiry was in no way intended as any complaint of Mr. Miller's services, who had left nothing to be desired in the form of courtesy or service throughout the past two years; that, as to the occasion

for the telephone call to Lee's office in the first place, he said, "My memory is rather sketchy on that subject, since it has been now three years. If my memory serves me, there was some question as to the form of my policies, which as a layman I couldn't understand too well, and our auditing people advised me to communicate with our agents. We did, and I believe—I am not sure of this, but I believe that I didn't get what I felt would be sufficiently prompt and adequate service. And the occasion of my personally calling—not a member of my staff but my personally calling and talking with one of Mr. Lee's staff members, was in the form of a complaint. The exact issue at the moment, or what I complained about, I really don't know. I wouldn't be honest to try to tell you anything." (J.A. 380-1); that he learned in a call to Lee's office that Miller was no longer there, and he later contacted Miller and asked him to place the same policy or renew through his own agency "through any other company he might represent at that time" (J.A. 380); and that he wrote a letter to Aetna directing that company to recognize Miller as his agent (J.A. 476), which was written on his stationery, and which he dictated to his own secretary (J.A. 382). Mr. Bonbrest did say that to the best of his knowledge he was awaiting recommendations from the Lee agency (J.A. 381), but in the context, it is apparent that he was referring to his answer quoted above, and his letter of April 21st to Lee clearly indicated that the call to Lee was prompted by recommendation of his firm's auditing company, in response to which he was awaiting a recommendation. There is no evidence whatsoever of Miller having anything to do with the account from the time he left Lee until Mr. Bonbrest called him on or about April 25, 1951. Moreover, Lee ap-

pears to have accepted this situation without question in writing Mr. Bonbrest on May 1, 1951 and inquiring as to who should handle certain pending matters on other policies, including a policy with another company (J.A. 537-8). It is inconceivable to counsel how any reasonable mind could infer solicitation by and with plaintiff's expirations record from the testimony in reference to this account.

Plaintiff claimed "interference" by the defendant Aetna Companies with the Washington, Marlboro and Annapolis Motor Lines account, which was transferred to defendant Miller in mid-term upon the instructions of Mr. L. L. Altmann, president of the Motor Lines. But the evidence disclosed that Mr. Altmann became annoyed with plaintiff over his holding return premiums as credits against current premiums, and decided to turn the account over to another agent. Mr. Altmann wrote a letter to Aetna on May 9, 1951, advising that defendant Miller was thereby appointed their agent "effective April 30, 1951" (J.A. 467). Plaintiff took exception to the *retroactive* change of agent, and sought the "cooperation" of Mr. Boone, Aetna's branch manager (J.A. 465-6). Mr. Boone agreed with plaintiff, and prevailed upon Mr. Altmann to make the change effective May 31, 1951, and to pay plaintiff the April and May premium installments, totaling $5,277.20. The entire arrangement was confirmed in writing to all parties by Mr. Boone (J.A. 467-72); and plaintiff accepted the solution of the problem (J.A. 163-64, 335). At the trial, plaintiff took the position that Aetna should not have allowed a mere transfer of agent in mid-term, but should have required that the existing policy be cancelled on the short rate basis, and thereby deterred Mr. Altmann

from making any change until the end of the policy year. It may be noted in passing that, as stated in *Beidler & Bookmyer* v. *Universal Ins. Co. (First Case)*, *supra*, "As it would be frivolous to make the rights of the parties turn on needless formalities, we think the situation is just as if appellee (the insurance company) had received from the insured a formal cancellation notice and a request for the issuance of a new policy and as if appellee had immediately accepted both." But, having taken a position at the time and procured the defendant Aetna Companies to act thereon, plaintiff was estopped from changing his position and asserting a contrary claim. *Casey* v. *Galli*, 94 U.S. 673, 24 L. ed. 168; *The Ohio and Miss. R.R. Co.* v. *McCarthy*, 96 U.S. 258, 267, 24 L. ed. 693, 696; *Dickerson* v. *Colgrove*, 100 U.S. 578, 580, 25 L. ed. 618; *deBobula* v. *Manhattan Storage and Transfer Co.*, 90 U.S. App. D.C. 202, 194 F. (2d) 885; *Louis Werner Saw Mill Co.* v. *Helvering*, 68 App. D.C. 267, 96 F. (2d) 539; 19 *American Jurisprudence—Estoppel*, Sections 50 and 51. Moreover, Mr. Boone's action could not be deemed "interference" in any event; and plaintiff received more commissions than he would have been entitled to receive on the short rate cancellation basis, so that there can be no merit in this contention.

It is respectfully submitted that the plaintiff failed to establish the essential facts of solicitation, of use of plaintiff's "expirations" records, or of malicious interference by the defendant Aetna Companies with his business, at least one of which, in the case of interference, and at least the remaining two of which, in the case of solicitation, were essential to the establishment of a cause of action and a right of recovery by plaintiff. Likewise, plaintiff failed to prove or

substantiate in any manner the alleged conspiracy to deprive him of his insurance business.

IV. CIVIL CONSPIRACY MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE

Upon careful and painstaking study of the record, the Court of Appeals found that there was no substantial evidence in support of the alleged conspiracy. Thereby, it was not necessary for the Court of Appeals to determine, and they did not determine, the degree or extent of proof required to establish civil conspiracy. But since petitioner seeks review by this Honorable Court, it seems appropriate to state the contention of respondents that plaintiff had the burden of establishing the alleged conspiracy by clear and convincing evidence. While counsel are unaware of any decision in the District of Columbia on the point, the rule is well established in the law that civil conspiracy must be proven by clear and convincing evidence. *United States* v. *Univis Lens Co.* (D.C., SDNY), 88 Fed. Sup. 809; *Stevenson* v. *Stevenson*, 36 C.A. (2d) 494, 97 P. (2d) 982; *Bergeson* v. *Mullinix*, 399 Ill. 470, 78 N.E. (2d) 297; *Fuller* v. *Garber*, 296 Ill. App. 389, 16 N.E. (2d) 251; *Woosley* v. *Wells*, (Mo.) 281 S.W. 695; *Title & Trust Co.* v. *Security Bldg. Corp.*, 129 Ore. 262, 277 P. 85; *Fife* v. *Great Atlantic and Pacific Tea Co.*, 356 Pa. 265, 52 A. (2d) 24; *Blank & Gottschall* v. *First Natl. Bank*, 355 Pa. 442, 50 A. (2d) 218; *Morris* v. *Halford*, 352 Pa. 138, 42 A. (2d) 411; *Morrow* v. *Morrow*, 61 Pa. Sup. Ct. 208; *Gager* v. *Reeves*, (Tex. Civ. App.), 235 S.W. (2d) 688; *Fernandez* v. *Cano*, (Tex. Civ. App.), 108 S.W. (2d) 310; *Dovich* v. *Chief Consolidated Mining Co.*, 53 Utah 522, 147 P. 627; *Cheesman* v. *Sattire*, (Wash.) 273 P. (2d) 500; *Harrington* v. *Richeson*, 40

Wash. (2d) 557, 245 P. (2d) 191; *Roberts* v. *Saukville Canning Co.*, 250 Wis. 112, 26 N.W. (2d) 145; *Lange* v. *Heckel*, 171 Wis. 59, 175 N.W. 788.

From its very nature, civil conspiracy is substantially the same as fraud; and it is significant that in a great many cases the two terms have been used interchangeably, if not synonymously, in defining the burden of proof to establish the same by clear and convincing evidence. *Guaranty Trust Co.* v. *Williamsport Wire Rope Co.*, (D.C., MD Pa.), 107 Fed. Sup. 759; *Connolly* v. *Gishwiller* (CCA-7), 162 F. (2d) 428; *Eagle Indemnity Co.* v. *Gill* (D.C., ED Ill.), 108 Fed. Sup. 936; *Edison Realty Co.* v. *Bauernschub*, 191 Md. 451, 62 A. (2d) 354; *Bachrack* v. *Washington United Cooperative*, 181 Md. 315, 29 A. (2d) 822; *Abbott* v. *Miller*, 226 Mo. App. 277, 41 S.W. (2d) 898; *Conners* v. *Bryce*, 170 N.Y. Sup. 94; *Elick* v. *Schiller*, (Tex. Civ. App.), 235 S.W. (2d) 494; *Rowley* v. *Brady*, (Tex. Civ. App.), 286 S.W. 241; *Cox* v. *Cox*, 259 Wis. 259, 48 N.W. (2d) 508; *Ziegler* v. *Hustisford Farmers Mut. Ins. Co.*, 238 Wis. 238, 298 N.W. 610; *In Re Hatten Estate*, 233 Wis. 199, 288 N.W. 279.

As the Court well knows, fraud must be established by clear and convincing evidence. *Oriel* v. *Russell*, 278 U.S. 358, 73 L. Ed. 419, 49 S. Ct. Rep. 173; *Lalme* v. *United States*, 164 U.S. 255, 41 L. ed. 425, 426; *United States* v. *Budd*, 144 U.S. 154, 36 L. ed. 384, 12 S. Ct. Rep. 575; *Northwestern Mut. Life Ins. Co.* v. *Nelson*, 103 U.S. 544, 26 L. ed. 436; *Ward* v. *Deavers*, 92 U.S. App. D.C. 167, 203 F. (2d) 72; *Zoslow* v. *Natl. Savings & Trust Co.*, 91 U.S. App. D.C. 391, 201 F. (2d) 208; *Wynne* v. *Boone*, 88 U.S. App. D.C. 363, 191 F. (2d) 220; *Thomas* v. *Doyle*, 88 U.S. App. D.C. 95, 187 F. (2d) 207; *Lockwood* v. *Christakos*, 86 U.S. App. D.C. 323, 181 F. (2d) 805; *Public Motor Service* v.

Stand. Oil of N. J., 69 App. D.C. 89, 99 F. (2d) 124; *Hardware Mut. Ins. Co.* v. *Jacob Hieb, Inc.*, (CCA-8), 146 F. (2d) 447; *The Sirius Star, Inc.* v. *Sturgeon Bay Shipbuilding and Drydock Co.*, (CCA-7), 196 F. (2d) 479; *Fidelity & Cas. Co. of N. Y.* v. *Genova* (CCA-6), 90 F. (2d) 874; *Equitable Life Assur. Soc.* v. *Johnson* (CCA-6), 81 F. (2d) 543; *Kamen Soap Products Co.* v. *United States* (Ct. Cls.), 124 Fed. Sup. 608.

Plaintiff alleged a conspiracy among defendants to deprive him of his insurance business, in violation of defendant Aetna Companies' contract with him and in breach of their duty of good faith toward him. Such a claim is in all essential respects a claim of conspiracy to defraud. Certainly, the rights of the parties should not depend upon the label placed by plaintiff upon his alleged cause of action, nor should they vary with the plaintiff's choice of words. Moreover, plaintiff should not be allowed to lessen his burden of proof by calling his claim a conspiracy rather than a fraud or a conspiracy to defraud. The same considerations of public policy exist in both situations, and require that the plaintiff prove such an alleged conspiracy to the same extent and with the same degree of conviction as is required for him in a claim of fraud.

V. NO QUESTION IS PRESENTED WHICH WARRANTS REVIEW BY THIS HONORABLE COURT.

Petitioner suggests that the reversal by the Court of Appeals with directions for entry of judgment for defendants deprives him of his right to a jury trial. Petitioner's argument seems to be that there were issues of fact for decision by the jury, and that thereby the reversal invaded his right to trial by jury. Respondents have answered this argument on the merits hereinabove, but in addition thereto deem it appropriate to point out that since they made timely

motions for directed verdict and for judgment notwithstanding the verdict, it is now the accepted and recognized practice in the Federal Courts to enter judgment notwithstanding a jury verdict where there is no substantial evidence to support the jury verdict, and that such action does not raise any constitutional question of denial of the right to a trial by jury. Rule 50(b) Federal Rules of Civil Procedure; *Galloway* v. *United States*, 319 U.S. 372, 388, 63 S. Ct. 1077, 87 Law Ed. 1458, 1469, reh. den., 320 U.S. 214, 63 S. Ct. 1443, 87 Law Ed. 1851; Annotation 85 Law Ed. 155, 161 et seq. Insufficiency of the evidence is a recognized basis or ground upon which a motion for judgment notwithstanding the verdict may be granted. That is the basis upon which the Court of Appeals reversed the verdict and judgment in this case.

Petitioner appears to argue the principle that the decision of the Court of Appeals in this case is in conflict with the decision of the Fourth Circuit Court of Appeals in the case of *Phillips* v. *Pennsylvania Threshermen Company, supra.* There is no conflict in the decisions. In the *Phillips* case, plaintiffs were appointed exclusive "Agent" of defendant for the State of Virginia (except 2 counties) in 1944, and continued as such until 1950 when the contract was terminated by defendant. During the period, plaintiffs appointed and instructed 173 sub-agents, at their expense except for license fees. The contract provided that, upon termination of the agreement, the agent, if not in default, should have its records and use and control of the expirations, and that the company should not be liable for any commission upon any renewal or business previously written by the agent. Within 30 days after termination of the agreement, defendant company had appointed at least 90 former

sub-agents of plaintiffs as agents, and they were actively soliciting renewals. Plaintiffs sued for damages for breach of the agreement, alleging that defendant had interfered with, and deprived plaintiffs of, the expirations on the business created by plaintiffs. Defendant denied any interference as to any business written by plaintiffs, and asserted that plaintiffs had no right to expirations on policies written by sub-agents. The District Court adopted the view of the defendant, and dismissed the action (on motion for summary judgment) except for certain commissions on business written before the termination of the contract. On appeal, the Court of Appeals, reversed, holding that the contract gave plaintiffs exclusive ownership of the expirations records on all business produced by plaintiffs, which included those of its sub-agents, that defendant could not use those records to solicit renewals, and could not employ the former sub-agents to do indirectly what it could not do directly. However in its opinion, the Court said:

> "The last sentence in paragraph 16" (the sentence providing that the company would not be liable for commissions on renewals, etc.) "relates to commissions on policies renewed after the termination of the contract and disposes of any right on the part of plaintiffs to commissions. For example, if an insured, for reasons personal to him, saw fit to renew his policy with defendant without solicitation by defendant, plaintiffs would have no right to commissions on such renewal. This sentence was intended to, and does, protect the defendant against claims for commissions, after the termination of the contract, on policies renewed without solicitation by defendant. *Northwestern Underwriters* v. *Hamilton*, 8 Cir., 151 F. (2d) 389. This construction of paragraph 16 gives meaning to the property rights of plaintiffs to the expirations and safeguards defendant

against claims for commissions on policies renewed after the termination of the contract in those cases where plaintiffs expirations have not been interfered with by defendant. * * *

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"We are not holding that the defendant is liable for employing the former agents selected by plaintiffs. If those agents had not made use of the expirations on policies written before the termination of the Contract, no actionable wrong would have been committed by defendant; but neither the defendant nor the reappointed agent nor a new agent had any right to use the expirations awarded to plaintiffs in their contract with defendant. * * *."

In fact, the decision of the Court of Appeals in this case is entirely in accord with the decision of the Fourth Circuit Court of Appeals in the *Phillips* case, and also is in accord with the decision of the Eighth Circuit Court of Appeals in *Northwestern Underwriters v. Hamilton*, *supra*, and the decision of the Second Circuit Court of Appeals in *Beidler & Bookmyer v. Universal Insurance Company*, *supra*. The decisions of all of those cases are properly and soundly based upon the contractual rights and obligations of the parties.

This case involves no more than a determination of the contractual and tortious liabilities and rights of the parties—a matter traditionally one of local law. Rule 19(b), of this Honorable Court's Rules, in spelling out that a writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only when there are special and important reasons therefor, plainly indicates that this Honorable Court does not contemplate that it will devote its time and attention to the consideration of cases such as this

No reason has been demonstrated, beyond mere allegation, that would bring this case within any of the situations meriting this Honorable Court's attention.

Moreover, the decision of the Court of Appeals in this case adjudges the rights of the parties the only way that the case can be fairly and justly determined under accepted and recognized principles of law. The decision should not be disturbed.

CONCLUSION

In conclusion, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review the judgment of that Court in this case should be denied.

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